Supreme Court, U.S.
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No. 011178

In The
Supreme Court of the United States

JOSEPH L. OTTO, pro se,

Petitioner,

vs.

JO ANNE B. BARNHART
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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36pp

QUESTIONS PRESENTED FOR REVIEW

1. What is the nature of protection afforded a pro se petitioner within the existing laws and the application of said laws to sufficiently insure a fair and unbiased evaluation of claim for disability?

2. What is the nature of protection under Article 1 and Article 7 of the Constitution?

3. Are rules and laws governing disabilities based on the whole man or are they selective and narrowly applied?

INTERESTED PARTIES

Case No: 01-13966-CC, Sep 25, 2001,
Justices CARNES, BARKETT and MARKUS,
Circuit Judges

Case No: 96-2416, May 1, 1997,
Justices ANDERSON, DUBNIA and BLACK,
Circuit Judges

Case No: 95-3151 & 96-2416, Sep 30, 1996,
Justices ANDERSON, EDMONDSON and COX,
Circuit Judges

Case No: 99-CIV-FTM-24D, Feb 23, 2000,
Justice Susan C. Bucklew,
United States District Court Judge

Case No: 2:99-cv-509-FtM-24D, Feb 14, 2000,
Magistrate Judge Douglas N. Frazier,
United States District Judge

Case No: 2:99-cv-509-FtM-24D,
May 18, 2000 and May 18, 2001
Justice Robert Goldberg,
Administrative Appeals Judge

Case No: 2:99-cv-509-FtM-24D,
Aug 7, 2000 and Sep 28, 2000,
Justice Rubin Rivera Jr., Administrative Law Judge

INTERESTED PARTIES – Continued

Case No: 01-13966 C, Sep 17, 2001,
Attorney Robert K. Gaskins,
Assistant Regional Counsel, Social Security

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Robert Goldberg, Administrative Appeals Judge
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Robert K. Gaskins, Attorney for Commissioner
- Opinions, June 11, 1999 and September 17, 2001

PETITION FOR WRIT OF CERTIORARI

Joseph L. Otto, pro se, respectfully petitions for the issuance of a writ of certiorari to review the judgment of the 11th Circuit Court of Appeals.

OPINION AND ORDER BELOW

The opinion of the 11th Circuit Court of Appeals, Case No: 01-13966-CC, Sep 25, 2001, dismissing Appeal on grounds of being untimely can be found in App. 13.

JURISDICTION

The 11th Circuit Court of Appeals on May 1, 1997 had REMANDED the case to the district court for additional medical information consistent with their order. After a couple of subsequent REMANDS, the last of which was by the district court on Feb 14 and Feb 23 (See App. 1, 2, 3) which were interpreted by Mr. Robert K. Gaskins, Assistant Regional Counsel for Social Security as a judgment that was immediately appealable. Consequently, the 11th Circuit Court of Appeals (Justices CARNES, BARKETT and MARCUS) on Sep 25, 2001, agreed and dismissed the case as untimely. This petition is timely filed within ninety days of that date as provided in Supreme Court Rule 13.3. This Court has jurisdiction to hear this case pursuant to Title 28, United States Code 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the pertinent part, the First Amendment to the United States Constitution provides: "Congress shall make no law . . . to petition the government for redress of grievances.". In the pertinent part, the Seventh Amendment to the United States Constitution provides: "In suits at common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, ...". In FRCP 38(a): "Where a type of action did not exist at common law at the time of the adoption of the constitution, a right to a jury trial will exist if the new type of action is similar to actions for which the right to jury trial did exist at common law.".

STATEMENT OF THE CASE

QUESTION 1.

On February 14 and 23, 2000 the Federal District Court, Ft Myers Division REMANDED case No: 99-00509 CV-FTM-24 to the Commissioner of Social Security, at their request.

On May 18, 2000 the Administrative Appeals Judge forwarded the REMAND to the Administrative Law Judge for further action consistent with their request for REMAND.

On September 7, 2000 Petitioner was scheduled for a hearing before an Administrative Law Judge, Judge Rubin Rivera Jr. Please note that it took the Commissioner from January 1992 until September of 2000 to schedule a hearing. On May 18, 2001 Judge Robert Goldberg, Administrative Appeals Judge for Social Security Administration denied Petitioner's claim and informed him he could file a new appeal within 60 days (plus 5 days for mail time) which Petitioner did on July 12, 2001. When Petitioner filed appeal in District Court it was immediately docketed in the 11th Circuit Court of Appeals without any judicial review.

On July 20, 2001 the Eleventh Circuit Court of Appeals gave Petitioner 40 days from date of being docketed in the Court, to file a brief which Petitioner filed on August 16, 2001.

On September 17, 2001, 31 days later, Mr. Robert K. Gaskins, Assistant Regional Counsel for Social Security Administration, filed a brief for Appellee stating "This court does not have jurisdiction to review the district court case of Otto v. Apfel, No: 99-CV-509 (M.D. Fl, Feb 23, 2000) because Claimant failed to file a timely notice of appeal.", in essence Petitioner should have appealed the REMAND of February 23, 2000. Mr. Gaskins knows better, but in his desperation to win, at any cost, he resorted to trickery, by manipulating the Law Mr. Gaskins convinced Justices CARNES, BARKETT and MARCUS, Circuit Judges for the 11th Circuit Court, and they DIS-

MISSED Petitioner's appeal for lack of jurisdiction stating that the appeal was not timely because Petitioner did not appeal the February 23, 2000 judgment. (See App. 4 – 12.)

> C.A. 8 (MD) 1999. Orders in which district court remands action to the Commissioner of Social Security Administration in conjunction with judgment affirming, modifying, or reversing Commissioner's decision are orders in which district court remands action to Commissioner of Social Security for further development of the record and are considered interlocutory and non appealable, in as much as district court retains jurisdiction over the action pending further development and consideration by the Administrative Law Judge (ALJ). Social Security Act, 205(g), 42 U.S.C.A. 405(g).

In a previous REMAND of March 18, 1999 Mr. Gaskins, in his APPELLEE'S RESPONSE TO COURT'S JURISDICTIONAL QUERY stated "It is the Commissioner's position that the district court March 18, 1999, order is not immediately appealable". Mr. Gaskins cannot have it both ways, either a REMAND is immediately appealable or it is not. According to 20CFR a REMAND is not immediately Appealable. For a year and a half, Social Security, several Judges and Petitioner slaved over this REMAND only to have Mr. Gaskins wipe out all of our combined efforts through a grandstand play is unthinkable, and, it is illegal.

QUESTION 2.

During the ten years that this case has been deliberated Petitioner has been lied to, denied proper evaluation of disabilities and has had his civil rights violated. In the OPINION of the Administrative Law Judge on May, 09, 1998 Judge Rivera stated "We will never find that you are disabled . . . .", when quoting Section 404.1529. Those three words were set apart, just as Petitioner has shown, and the word "never" was underlined, they were however contained within the quotes.

Judge Robert Goldberg, appeals judge for Social Security said that Petitioner took the words out of context and misunderstood them. It is the Petitioner's position that when words are included within "quotes" it is the personal guarantee of the author that all the words are in fact true quotes.

The Administrative Law judge refused to evaluate all of the Petitioner's disabilities as required by 20 C.F.R. On September 30, 1996 Justices ANDERSON, EDMONDSON and COX dismissed my appeal sua sponte for lack of jurisdiction. On November 6, 1996 Petitioner filed a Notice of Appeal to have Petitioner's appeal heard by the Supreme Court of the United States.

I thought that my appeal would be docketed in the Supreme Court and was awaiting directions from this court. Petitioner apologizes for his ignorance of the law.

While awaiting further instructions, and much to Petitioner's surprise, on May 1, 1997 Petitioner received a JUDGMENT from Justices ANDERSON, DUBINA and BLACK, circuit judges for the 11th Circuit Court of Appeals, vacating judgment of the District Court and REMANDED to said District Court for further proceedings in accordance with the opinion of the 11th Circuit Court. This was the first indication that someone had actually read petitioner's appeal because the REMAND was for additional medical information which the Administrative Law Judge had deliberately failed to consider.

The 11th Circuit Court of Appeals agreed that "As the Commissioner admits, for example, "(t)here is little evidence in the record relevant to (Otto's) hypertension,". "Likewise, information regarding the extent of Otto's chronic pleuritis and chronic obstructive pulmonary disease is notably absent.". No consultative examination was ever requested by the Administrative Law Judge as to the specific complaints.

Petitioner's left lung was removed in December of 1991, Kyphoscilious was diagnosed by the United States Air Force in 1964 and subsequently diagnosed with arthritis in the spine and bone deterioration. The complaint of shortness of breath (dypsnea) (COPD) was diagnosed in 1991 when the lung was removed. All of these disabilities were ignored by the Administrative Law Judge.

The ALJ did include high blood pressure as meeting

the standard of de minimus, however he failed to consider the affects of mixing a bate blocker and a calcium channel blocker which damage the heart muscle, swelling of the feet and ankles, dizziness and light-headedness. My doctor recently added a diuretic to my blood pressure regime. All of the above justifies the need for a trial by jury in accordance with Amendment 7 to the Constitution and FRCP 38(a).

QUESTION 3.

When the Administrative Law Judge evaluated Petitioner's disabilities he was selective in that the only things he considered was the removal of the left lung and high blood pressure without consideration of the post operative affects of removing the entire lung and the subsequent loss of lung capacity and shortness of breath.

Also, he failed to consider the deformed spine with painful affects of arthritis and bone deterioration, nor did he consider the affects of medication for hypertension. Petitioner feels that when the ALJ denied consideration of all disabilities and he made prejudicial remarks such as "We will never approve your disability", he was covertly masking his personal feelings toward claimant. This was discussed with Mr. Gaskins with assurance of a fair hearing.

REASONS FOR GRANTING THE WRIT

There is undoubtedly a determination not only needed, but required of this Honorable Court to bring justice to and return the faith of the American Public with regard to when and if justice is served. All too often, with the onus of everyday workload of the Courts it is easier to rubber stamp denials of appeals and remove Justice from the Justice Department. From the beginning of this claim for disability ten years ago Petitioner has been denied a fair and unbiased evaluation of his total disabilities.

In Jones v. Department of Health and Human Services, 941, F.2d 1529, "Administrative Law Judge is required to consider combined effect of all of disability benefits claimant's impairments; that each illness standing alone might not be disabling is not conclusive on question of whether claimant is disabled.". The Social Security Act (Act) requires that all disabilities be fully evaluated to determine if claimant has the residual functional capacity to perform jobs that afford him substantial gainful employment. In this regard, age, education and experience must be considered. Prior employment is also a factor in determining capabilities.

The Administrative Law Judge (ALJ) for Social Security refused to consider all of Claimant's infirmities, i.e., Kyphosciliosis (deformity of the spine) with bone deterioration and arthritis, dypsnea (shortness of breath on mild exertion), swelling of feet and ankles, light-head-

edness and dizziness caused by medication for high blood pressure (75 mg Tenormin, 10 mg Felodipine).

Petitioner did not apply for disability until his entire left lung was removed due to cancer in December of 1991. The ALJ determined that the removal of the lung was severe within the Act and that high blood pressure reached the standard of de minimus within the Act. However, the ALJ refused to have all of the disabilities of claimant evaluated.

On August 18, 2000 The ALJ received medical information from the National Personnel Records Center and would not disclose what information was included. In 1997 the 11th Circuit Court of Appeals remanded the case for additional medical information consistent with Petitioner's claim.

The ALJ refused to honor the remand by saying that any medical information after expiration of Disability Insurance (Mar 1993) would not be accepted. The ALJ refused to evaluate all disabilities claimed by Petitioner during the insured period. Two, after the fact, controversial claims were Pulmonary Hypertension and a 5.5 cm Aneurysm of the aorta in the stomach which required an operation to introduce plastic tubes in the aneurysm and both aortic stems of the upper legs. The ALJ said they were not diagnosed prior to March 1993, however, if the ALJ had followed the requirements of the Act, the Pulmonary Hypertension would have been discovered

within the insured time frame.

Your honors, Petitioner was 61 years old when this claim was filed and is now 100% service connected disabled, attributed to loss of left lung and pulmonary hypertension.

In Torres v. Bowen, 700 F. Supp 1306. In assessing disability claims, Secretary of Health and Human Services must make a thorough inquiry into claimant's condition and must be mindful that Social Security is remedial, SS Act 1 et seq, 223(d)(1)(A), (D)(5), 1614(a)(3)(A), as amended, 42 U.S.C.A. 301 et seq,. 423(d)(1)(A), 1382c(a)(3)(A).

The need for this Honorable Court to honor this Writ is further amplified by the ability of Attorneys to get disability for claimant's with one of the infirmities enumerated by Petitioner. This is evident when we have all seen, on television, a disability claimant being awarded disability for back pain associated with his/her accident on the job and see pictures of that same individual lifting 80lb sacks of cement. Petitioner has personal knowledge of individuals, assisted by an attorney, receiving disability for Asthma. Petitioner has mentioned these claims to enlighten this honorable Court with the prejudice of the courts when dealing with a pro se Claimants.

Granting of this writ is also highlighted by the fact that this claim has been remanded to Social Security on five

occasions. The Act states that cases can be remanded for good cause, however at one point Social Security's good cause was to correct administrative error. On all five of those REMANDS Petitioner did not appeal the REMANDS and Social Security was given an opportunity to correct mistakes that were brought to the attention of the court by the Appellant/Petitioner. However, on the last remand the Attorney for Social Security said that the Petitioner should have appealed the last of five REMANDs.

In C.A. 8 (Md) 1999. Orders in which district court remands action to the Commissioner of Social Security Administration in conjunction with judgment affirming, modifying, or reversing Commissioner's decision are orders in which district court remands action to Commissioner of Social Security for further development of the record are considered interlocutory and non appealable, inasmuch as district court retains jurisdiction over the action pending further development and consideration by the Administrative Law Judge (ALJ). Social Security Act, 205(g), 42 U.S.C.A. 405(g).

One last reason this Honorable Court should grant this Writ is what protection can be expected under Amendment 1 (Redress of Grievances) and Amendment 7 (Trial by Jury) to the Constitution. Every time Petitioner appealed to the Federal Court he requested a trial by jury and was ignored. In the Act it states that jury trials should be discouraged because juries are more lenient. With all due respect it is the opinion of the Petitioner that there is a dif-

ference between discourage and denial. When a pro se Plaintiff/Petitioner is treated as badly as has been the case in all previous courts it becomes necessary for all Americans to be afforded the right to trial by jury.

Amendment 1, Constitution. Petition the government for a redress of grievances.

Amendment 7, Constitution. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

FRCP 38(a). Where a type of action did not exist at common law at the time of the adoption of the constitution, a right to a jury trial will exist if the new type of action is similar to actions for which the right to jury trial did exist a common law. Amendment 7 to the Constitution is of significance and for hundreds of years jury trials have been an important safeguard between man and his government.

CONCLUSION

Petitioner concludes that Attorney Robert K. Gaskins, Assistant Regional Counsel, Social Security erred when he found on September 17, 2001 that a REMAND from the district court on September 14 and 23, 2000 to Social Security for further processing, per their request, was immediately appealable and consequently caused Petitioner's appeal, a year and a half later, to be untimely. This

error, or deliberate violation of the law, caused Justices CARNES, BARKETT and MARCUS, Circuit Judges, 11th Circuit Court of Appeals to dismiss the case as untimely. (See App. 13, 14.)

On all four previous occasions, those cases had been REMANDED without any appeals. Appeals were submitted only after completion of reasons for REMAND had been satisfied and at the direction of the Administrative Appeals Judge, Social Security Administration.

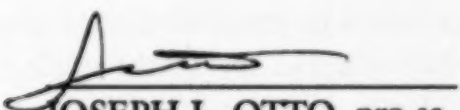
From first application for disability January 2, 1992 the Administrative Law Judge, Judge Rubin Rivera Jr., has failed to comply with the provisions of 20 CFR in that he did not apply himself to determining the gravity of all disabilities claimed by claimant. He dwelled only on the recovery from the operation to remove my lung and did not include other infirmities. This shortcoming was substantiated by the 11th Circuit Court of Appeals on May 1, 1997 wherein the Court spelled out the lack of medical evidence as claimed by Petitioner.

The order of the 11th Circuit Court was ignored by the ALJ and instead of complying with the order Judge Rubin Rivera Jr., said it was claimants responsibility to provide medical information and that it must be dated prior to Mar of 1993. The ALJ's reluctance to comply with 20 CFR and the order of the court has caused a lengthy, unrelenting battle to prove which side is right.

Ten years of my life has been totally devoted to this claim, every action has a time limit imposed for further action and claimant had to be on alert everyday to provide a timely response. Three of my sisters and a brother-in-law have passed away while I have been trying the get what is rightfully mine under 20 CFR. To have all this destroyed by a miscarriage of justice or false application of the law is unacceptable. Petitioner filed, with the 11th Circuit, a BRIEF FOR APPELLANT/PLAINTIFF on October 1, 2002 requesting RECONSIDERATION and it was denied as "This appeal was dismissed on 9/25/01".

Petitioner prays this Honorable Court will grant this writ and restore his faith in at least a part of the Judicial system.

Respectfully submitted



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JUDGMENT IN A CIVIL CASE

JOSEPH LEROY OTTO, *Plaintiff,*	)	CASE NUMBER: 2:99-CV-509-FTM-24D
vs.	)	(Filed Feb. 23, 2000)
KENNETH S. APFEL, Commissioner of Social Security *Defendant,*	)	

X Decision by Court

IT IS ORDERED AND ADJUDGED that this cause be remanded to the Commissioner of Social Security for further action.

February 23, 2000
Date

Sheryl L. Loesch
Clerk

s/ Alvin Alayow
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOSEPH LEROY OTTO, *Plaintiff,*	)	CASE NUMBER: 99-509-CIV-FTM-24D
vs.	)	(Filed Feb. 23, 2000)
KENNETH S. APFEL, Commissioner of Social Security *Defendant,*	)	

ORDER

THIS CAUSE is before the Court upon the motion of the Defendant to remand this case to the Commissioner for further action under sentence four of 42 U.S.C. 405(g) and 1383(c)(3). Upon Consideration of the motion, and the grounds urged in support thereof, it is

ORDERED and ADJUDGED that the decision of the commissioner is hereby reversed under sentence four of 42 U.S.C. 405(g) and this case is hereby remanded to the Commissioner of Social Security for further proceedings consistent with the motion.

The Clerk of the court is hereby directed to enter a sep-

arate judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

So Ordered.

DONE and ORDERED at Ft. Myers, Florida, this 22nd day of February, 2000.

s/ Susan C. Bucklew
UNITED STATES DISTRICT JUDGE

Copies to:
Joseph Leroy Otto
Susan Roark Waldron, AUSA-Tampa

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH LEROY OTTO,	)	CASE NUMBER:
Plaintiff-Appellant,[1]	)	01-13966-C
	)	
vs.	)	(Undated)
	)	(Certificate of Service
LARRY G. MASSANARI,	)	dated Sept. 17, 2001)
Acting Commissioner of	)	
Social Security	)	
Defendant-Appellee,[2]	)	
	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FT. MYERS DIVISION

STATEMENT OF JURISDICTION

This court does not have jurisdiction to review the district court case of Otto v. Apfel, No. 99-CV-509 (M.D. Fl., Feb. 23, 2000) because Claimant failed to file a timely notice of appeal. The final decision in the district court case at issue was entered on February 23, 2000, Doc 13,

[1] Appellant will be referred to as "Claimant."

[2] Appellee will be referred to as "Commissioner."

ORDER; Doc 14, JUDGMENT;[3] Commissioner's Exhibit 1. A timely notice of appeal had to be filed within sixty days after the judgment or order appealed from was entered. Fed. R. App. P. 4(a)(1)(B). Claimant filed his notice of appeal on July 12, 2001, nearly a year-and-a-half after the district court's final order. Doc 15, NOTICE OF APPEAL; Complainant's Exhibit R 15. Barring "unique circumstances" not present in this case, if the notice of appeal is not timely filed the appellate court is without jurisdiction to hear an appeal. *Advanced Estimating Systems, Inc. v. Riney,* 77 F.3d 1322, 1323 (11th Cir. 1996).[4]

STATEMENT OF THE ISSUE

WHETHER THIS APPELLATE COURT HAS JURISDICTION TO HEAR THIS CASE.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

The record shows that Claimant initiated this case, *Otto v. Apfel*, No. 99-CV-509, on October 22, 1999, by fil-

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[3] "Doc" denotes the documents shown on the district court's docket sheet.

[4] The Commissioner submits that this pro se Claimant may not have intended to file a "notice of appeal" but, instead, was attempting to file a new complaint with the district court seeking judicial review of a recent administrative decision denying him Social Security disability benefits. The Commissioner explains this possibility in his argument, page 6 of this brief.

ing a complaint in the United States District Court for the Middle District of Florida.

Doc 1. On December 7, 2000, the Commissioner answered the complaint and filed a transcript of the entire record of the administrative proceedings.

Doc 5. The Commissioner, however, then moved the court to remand the case for further administrative consideration.

Doc 10, MOTION. On February 14, 2000 United States Magistrate Judge Douglas N. Frazier recommended the case be remanded pursuant to sentence four of 42 U.S.C. 405(g).

Doc 12, REPORT AND RECOMMENDATION; Claimant's Exhibit 2. On February 23, 2000, United States District Judge Susan C. Bucklew adopted the magistrate judge's report and recommendation, remanded the case to the Commissioner, and closed the case.

Doc 13, ORDER;

Doc 14, JUDGMENT; Commissioner's Exhibit 1. Claimant filed a document captioned "notice of appeal" on July 12, 2001, nearly a year-and-a-half later.

Doc 15; Claimant's Exhibit R 15.

STATEMENT OF FACTS

The Commissioner is not aware of any certified facts in this case beyond those stated in the procedural history.

SUMMARY OF THE ARGUMENT

This Court should dismiss Claimant's appeal because it does not have jurisdiction. This court does not have jurisdiction because Claimant failed to file a timely notice of appeal. The district court issued its decision in the case Claimant has appealed, *Otto v. Apfel*, No. 99-CV-509 (M.D. Fl., Feb. 23, 2000), on February 23, 2000. Barring "unique circumstances" not present in this case, a timely notice of appeal had to be filed within sixty days after the judgment or order appealed from was entered or this Court is without jurisdiction to hear the appeal. The record is clear that Claimant filed his notice of appeal on July 12, 2001, nearly a year-and-a-half after the district court's final order, thereby denying appellate jurisdiction.

ARGUMENT

THIS APPELLATE COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CASE

STANDARD OF REVIEW

This court reviews purely legal issues such as jurisdiction *de novo*. *Sandvik v. United States*, 177 F.3d 1269, 1271

(11th Cir. 1999).

DISCUSSION

This Court simply has no jurisdiction over this case because Claimant failed to file a timely notice of appeal. United States District Judge Susan C. Bucklew entered the final decision in the district court case, *Otto v. Apfel*, No. 99-CV-509 (M. D. Fl., Feb 23, 2000), when she reversed and remanded the case pursuant to sentence four of 42 U.S.C. 405(g) on February 23, 2000.

Doc 13, ORDER;

Doc 14, JUDGMENT; Commissioner's Exhibit 1. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. 1219. A final decision is narrowly defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgement." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir.), **cert. denied**, 464 U.S. 893 (1983) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Judge Bucklew's February 23, 2000, judgment reversing and remanding the case pursuant to sentence four of 42 U.S.C. 405(g) was a judicially final decision and, at that point, the civil action was terminated and the court's

jurisdiction ceased. *Shalala v. Schaefer*, 509 U.S. 292, 299 (1993); *Melkonyan v. Sullivan*, 501 U.S. 90, 102, 111 (1991); see *Jackson v. Chater*, 99 F.3d 1086, 1089 (11th Cir. 1996).

A timely notice of appeal had to be filed within sixty days after the judgment or order appealed from was entered Fed. R. App. P. 4(a)(1)(B). Claimant filed his notice of appeal on July 12, 2001, nearly a year-and-a-half after the district court's final order.

Doc 15, NOTICE OF APPEAL. Barring "unique circumstances" not present in this case, if the notice of appeal is not timely filed the appellate court is without jurisdiction to hear this appeal. *Advanced Estimating Systems, Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996). Strict construction mandates this Court dismiss Claimant's appeal for lack of jurisdiction.

Even though it is the Commissioner's position that this case should be dismissed, in the interest of justice, the Commissioner notes that the pro se Claimant may have made a procedural error and another remedy might be possible. It appears from the documents Claimant submitted with his brief to this Court that he actually may have been attempting to file a new complaint seeking judicial review under 42 U.S.C. 405(g) of a recent final administrative decision.

Documents Claimant presented in connection with his

current appeal suggest he may have denominated a pleading intended as a new complaint seeking review of a recent final decision of the Commissioner as a "Notice of Appeal."

Doc 18, NOTICE OF APPEAL; Claimant's Exhibit R 15, Claimant's documents show that an administrative hearing was held on September 7, 2000. Claimant's Exhibit 6. On September 28, 2000, an Administrative law judge found Claimant was not disabled. Claimant's Exhibit 6. On May 18, 2001, the Commissioner's Appeals council declined to review that decision, allowing it to become the Commissioner's final decision after a hearing and, accordingly, ripe for judicial review pursuant to 42 U.S.C. 405(g). Claimant's Exhibit 7. The Appeals Council's notice clearly explained that "the previous court order . . . ended the court's review of the prior decision," and that if he desired judicial review of the Commissioner's September 28, 2000 decision he "must commence a new civil action by filing a complaint in the United States District Court . . . within sixty (60) days . . ." Claimant's Exhibit 7.

Although the first page of Claimant's July 12, 2001 document is captioned "PLAINTIFF'S NOTICE OF APPEAL," the second page is captioned "COMPLAINT".

Doc l5, NOTICE OF APPEAL; Claimant's Exhibit R 15. Claimant filed this "Notice of Appeal" on July 12, 2001, fifty-five days after the Appeals Council notice, allowing a reasonable inference that he intended to com-

ply with the Appeals Council's directions on how to seek judicial review.[5]

Should this Court review the documents Claimant has submitted in connection with this appeal and find that the district court misconstrued Claimant's July 12, 2001 pleading as a notice of "appeal" instead of a "complaint," this Court could remand the case to the district court with directions to construe that pleading as a timely filed complaint seeking judicial review of the administrative law judge's September 28, 2000 decision. At that time, the district court could answer the complaint and file a transcript of the record of the administrative proceedings in accordance with 42 U.S.C. 405(g).

CONCLUSION

The Court should dismiss this appeal because it does not have jurisdiction. Claimant did not file the requisite timely notice of appeal. Barring "unique circumstances"

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[5] Should this Court find that Claimant indeed did intend to file a new complaint and, in the interest of justice, believe Claimant should have the opportunity for judicial review, this case is not yet ready for any court to make a substantive reiew to determine whether the Commssioner's recent final decision is supported by substantial evidence. Once a complaint is properly filed, the Commissioner must prepare an answer and as a part of that answer "file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." 42 U.S.C. 405(g). Only after the certified transcript is filed can any court make a substantive review.

not present in this case, this Court is without jurisdiction to hear this case unless Claimant filed a notice of appeal within sixty days after the judgment or order appealed from was entered. The record is clear that Claimant filed his notice of appeal on July 12, 2001, nearly a year-and-a-half after the district courts final order, thereby denying appellate jurisdiction.

Respectfully submitted,

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United States Attorney

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Regional Chief Counsel
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-133966-CC

JOSEPH LEROY OTTO,

Plaintiff-Appellant,

versus

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before CARNES, BARKETT and MARCUS, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. Appellant's notice of appeal, filed on July 12, 2001, is not

timely from the entry of the judgment on February 23, 2000. See Fed. R. App. P. 4(a)(1)(B) and 26(a)(3).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir. R. 40-3 and all other applicable rules.

(Filed Sept. 25, 2001)